

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1449

To be argued by
PAUL VIZCARRONDO, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1449

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT T. LOEWY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

PAUL VIZCARRONDO, JR.,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

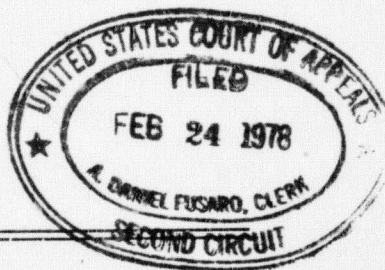
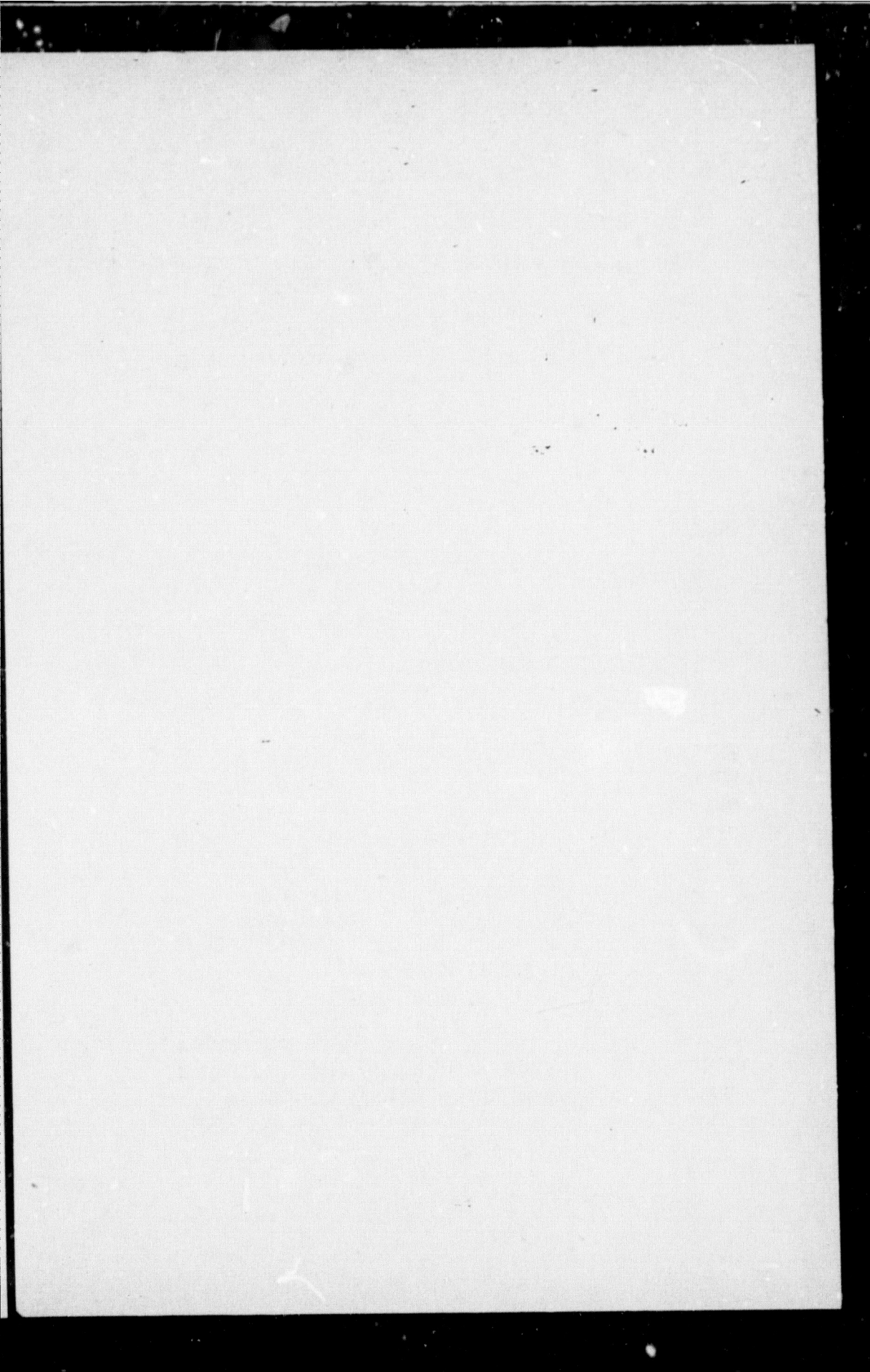


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1449

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT T. LOEWY,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Robert T. Loewy appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York after a five-day trial before the Honorable Charles L. Brieant, United States District Judge, and a jury.

Indictment 77 Cr. 411, filed June 2, 1977, in fourteen counts, charged Robert Loewy and five other defendants with conspiracy and securities fraud in connection with the public offering of the stock of Ecological Manufacturing Corporation ("EMC"), and with obstruction of justice in connection with an investigation by the United States Securities and Exchange Commission ("SEC") of the affairs of EMC. Specifically, Count One charged Robert Loewy with conspiring, in violation of Title 18, United States Code, Section 371, with Benjamin T. Loewy,

Alan S. Becker, Joseph L. DeFilippo, Vincent J. Agostino and S. Jack Rothman to pay secret compensation and commissions to DeFilippo for selling the common stock of EMC to the public and to make secret payments to certain of the conspirators from the proceeds of that stock sale. Counts Two through Eleven charged the same defendants with securities fraud, in violation of Title 15, United States Code, Sections 77q(a) and 77x, in connection with the scheme charged in Count One. Count Twelve charged Robert Loewy, Benjamin Loewy, Becker and DeFilippo with obstructing justice, in violation of Title 18, United States Code, Section 1505.*

The trial of Robert Loewy on Indictment 77 Cr. 411 commenced on September 15, 1977,** and concluded September 21, 1977, when the jury returned a verdict of guilty on Count Twelve, obstruction of justice. Upon the jury's report that it could not reach a verdict on Counts One through Eleven, Judge Brieant granted, over the Government's objection, the defendant's motion for a mistrial as to those counts.

* Count Thirteen charged Agostino and Count Fourteen charged Rothman with making false declarations to the grand jury that investigated the EMC public stock sale, in violation of Title 18, United States Code, Section 1623. On June 9, 1977, Information 77 Cr. 431 was filed charging in one count Ernest Milchman, who was named as a co-conspirator but not as a defendant in Indictment 77 Cr. 411, with being a member of the same conspiracy that was charged in Count One of Indictment 77 Cr. 411.

** Prior to the commencement of Robert Loewy's trial, all of his co-defendants pled guilty to one or more counts of Indictment 77 Cr. 411. Becker, Agostino and Rothman each pled guilty to Count One, DeFilippo pled guilty to Count Two, and Benjamin Loewy pled guilty to Counts One and Two. In addition, Milchman pled guilty to the single count of Information 77 Cr. 431.

On October 14, 1977, Judge Brieant sentenced Robert Loewy to a term of imprisonment of one year and one day. Robert Loewy is enlarged on a \$10,000 personal recognizance bond pending this appeal.

Statement of Facts

In 1970, Alan Becker formed a company that was eventually to be called Ecological Manufacturing Corporation ("EMC").* Becker formed the company for the purpose of producing and marketing a pesticide, methoxychlor, for which Becker believed he had developed a new, superior production method. Becker thought that his product, to which he gave the brand name "Emtex," could be sold profitably as an effective, relatively non-toxic replacement for DDT. It soon became apparent to Becker that production and marketing of Emtex would require substantially more capital than the approximately \$20,000 with which he formed the company. In late 1970, therefore, he began trying to raise several hundred thousand dollars for his company. (Tr. 51-54).**

In late 1970 or early 1971, a member of the law firm that had incorporated Becker's company introduced Becker to Corporate Advisory Council ("CAC") and its two principals, Benjamin Loewy and his son Robert Loewy.***

* The company was originally incorporated in New Jersey as Ecological Manufacturing Associates, Inc. and was authorized to issue a total of 100 shares of stock. In 1971, when it was decided to raise capital for the company through a public sale of its stock, the company was reincorporated in New York as EMC and with authorization to issue a substantially larger number of shares. (Tr. 51-52, 63-64).

** "Tr." refers to the trial transcript; "GX" refers to Government exhibits; "DX" refers to defense exhibits; "Br." refers to appellant's brief on appeal; "App." refers to the Appendix.

*** CAC's only other employee was a part-time secretary.

The Loewys, self-professed specialists in arranging for corporations to sell their stock to the public, told Becker that they could raise \$500,000 for his company in a Regulation A * public offering of its stock. The Loewys stated that they would obtain an underwriter, as well as any attorneys, accountants and other persons necessary for a public stock offering, and would see to it that all the details of the offering were taken care of. In return for their services, the Loewys demanded from Becker a total of approximately \$14,000 before the effective date of the stock offering, and a three-year "management consulting" contract, at \$25,000 per year from the date of the successful closing of the offering. After some deliberation, Becker accepted the Loewys' proposal. (Tr. 56-61).

By October, 1971, Becker paid CAC a total of \$14,000, as per his agreement with the Loewys. (Tr. 62-63, 68-69, 73-74; GX 1, 3, 5). The Loewys, pursuant to their end of the agreement, arranged for an attorney, Arthur Kronenberg, to represent the company in the public offering and another attorney, Ernest Milchman, to represent the underwriter. (Tr. 64-65, 313-16). The Loewys, however, had difficulty finding an underwriter that could successfully sell the issue. The first underwriter that they obtained in February, 1971, Interstate Equity Corporation, went out of business soon thereafter. In the Fall of 1971, Kronenberg found another underwriter, Carlton-Cambridge, Inc. ("Carlton"). For a \$1000 fee, the principals of Carlton were willing to have the firm's name put on the offering circular as the underwriter of the offering and to handle any orders for the stock that Becker and the Loewys obtained or that resulted from tombstone advertisements. Carlton's principals, however, were not willing to have their salesmen actively try to

* 15 U.S.C. § 77c(b); 17 C.F.R. 230. 251-63 (1977).

sell the issue, even though at a meeting attended by Benjamin and Robert Loewy, Becker and Milchman, Benjamin Loewy offered them approximately \$25,000 in extra compensation if they did so.* Becker nevertheless agreed to have Carlton underwrite the issue on the terms set forth by its principals. The offering began in February, 1972, for a sixty-day period, with a minimum of 60,000 shares at \$2.50 per share necessary for the issue to become effective. Due to Carlton's desultory efforts, however, the minimum number of shares necessary for the issue to become effective were not sold and the issue was cancelled. (Tr. 70-72, 76-80; GX 4).

Thus, by April, 1972, more than one year had passed since Becker's agreement with the Loewys and Becker had paid the Loewys \$14,000 required at his end of the bargain, but much to Becker's anger the Loewys had not delivered their end—the public issue of stock that was necessary for EMC to begin operations. Both Loewys assured Becker that a new underwriter would soon be found, and their promises were fulfilled when Milchman met Vincent J. Agostino and S. Jack Rothman, who owned a stock transfer agency and worked part-time for Horizon Securities, Inc. ("Horizon"), a stock broker-dealer. Milchman described EMC to Agostino and Rothman and explained that the company was searching for a firm to underwrite a public offering of its stock. Agostino and Rothman told Milchman that Horizon's president, Joseph L. DeFilippo, could be interested in underwriting the issue. (Tr. 321-23).

* Several months later, during the offering period, Benjamin Loewy told Becker, in Robert Loewy's presence, that they had raised their offer to Carlton's principals to \$50,000 in extra compensation if Carlton's salesmen would actively sell the stock, but the principals again refused the offer. (Tr. 78-80).

Shortly thereafter, a meeting was held at Horizon's offices that was attended by Benjamin and Robert Loewy, Becker, Milchman, DeFilippo, Agostino and Rothman. At that meeting, Benjamin Lowey promised DeFilippo that after the closing of the public offering the company would arrange for 25,000 EMC shares to be purchased on the over-the-counter market at twenty-five to seventy-five cents per share above the \$2.50 per share price at which the stock would be sold during the underwriting.* DeFilippo asked to have a few minutes to consider the proposal, so the EMC group walked into the hall outside his office. A few minutes later, Agostino and Rothman came out of DeFilippo's office and pulled Milchman aside. Rothman told Milchman that Horizon would do the underwriting if EMC paid an extra commission of ten percent, or \$50,000. Milchman passed the proposal on to Benjamin Lowey who approved it. It was later decided that this extra \$50,000 commission would be divided among DeFilippo, Agostino, Rothman and Milchman. (Tr. 81-85, 265-67, 324-27, 329-30).

The offering circular that was prepared for the Horizon underwriting of the EMC stock issue was virtually the same circular that had been prepared for the aborted Interstate Equities, Inc. and Carlton underwritings. All three circulars were written by Benjamin Loewy, Robert Loewy and Kronenberg; the section in all three circulars describing how the proceeds of the offering were to be used was written by the two Loewys. (Tr. 67-68, 74-75, 85-86, 89-90, 327-28; GX 2B, 6, 7). The offering circular

* This after-market support would have guaranteed a profit to favored subscribers to the EMC issue who would sell their shares on the over-the-counter market shortly after the offering was completed. Persons who purchased the stock on the over-the-counter market during the support period would be paying a price that was inflated beyond what would be set by supply and demand. (Tr. 262-63).

for the Horizon underwriting, which was distributed to prospective purchasers of the stock, did not disclose the promise to support the after-market that was made to induce DeFilippo to agree to underwrite the issue or the \$50,000 payment from the offering proceeds that was to be divided among DeFillippo, Milchman, Agostino and Rothman. Neither the Loewys nor CAC was mentioned in the offering circular, nor was the compensation they had received and were to receive for arranging the public offering. (Tr. 269; GX 7). In addition, the offering circular stated that Jack Oxman was to receive a \$3000 "finder's fee" from the offering proceeds. In truth, Oxman played no part in finding Horizon or any other firm to underwrite the issue or in any other aspect of the offering. Oxman was a friend of Benjamin Loewy who agreed to let his name be used as a finder and to kick-back all but ten percent of the fee to CAC. (Tr. 75-76, 89, 96, 268-69, 295-306; GX 7, 11, 36A).

The EMC public offering successfully closed on July 17, 1972 with all offered stock having been sold to the public for a total of \$500,000. (Tr. 92-93, 269-70). As per his agreement with the Loewys, Becker gave Benjamin Loewy a \$25,000 check on that day. (Tr. 93-95; GX 8). Benjamin Loewy subsequently gave Becker documents for EMC's files that falsely stated that the \$25,000 payment was CAC's commission for negotiating a fictitious \$250,000 sale of EMC products. (Tr. 114-20, 153-60; GX 17). Becker also gave Benjamin Loewy a \$3000 check payable to Jack Oxman. Oxman cashed the check and gave CAC \$2700. (Tr. 96, 304-06; GX 11, 36A). In addition, Becker gave the Loewys \$2100 in July and in August, 1972, as monthly payments under the three year "management consulting" contract between CAC and EMC. (Tr. 102-06; GX 15A, 15B, 15C, 15D).

Shortly after the closing of the stock offering, the plan to support the after-market in EMC stock was dropped

because the public market in the stock was doing extremely well, and the \$50,000 from the offering proceeds that had been earmarked by the Loewys and Becker for the after-market support was instead lent to Horizon, which was short of capital. (Tr. 274-77, 283-86). Benjamin Loewy accomplished this by having Becker write a \$50,000 check to a Stanely Goldfoot and by creating with Becker a false receipt for EMC's files stating that the \$55,000 was payment for the purchase of chemicals and equipment from Goldfoot. The \$55,000 was thereafter deposited in a checking account in the name of Iscoram Corporation, an apparently dummy company, and a check was written on that account to Horizon for \$50,000, with \$5000 remaining in the account. On July 24, 1972, Benjamin Loewy gave the \$50,000 check to DeFilippo. (Tr. 97-102, 252-53, 283-84; GX 12, 13, 14A, 14B, 14C, 14D, 14E).*

In August, 1972, Milchman, who had replaced Kronenberg as EMC's attorney, had Becker purchase \$50,000 in treasury notes with part of the offering proceeds. Milchman took the notes, which were in bearer form, and put them in a safe deposit box, intending to divide them with Agostino, Rothman and DeFilippo when it was safe to do so. (Tr. 106-10, 328-30).

In September, 1972, the *National Observer*, a weekly newspaper, published a front-page story exposing misrepresentations that Becker had made in public about his educational background ** and work experience and

* Benjamin Loewy told Becker, in Robert Loewy's presence, that when Horizon repaid the loan the money need not be returned to EMC but could be distributed to Becker, the Loewys and others. (Tr. 140-41).

** The offering circular stated that Becker had received a B.S. degree from New York University, and on several occasions in public, including during an appearance on the Barry Farber radio show, Becker referred to himself as "Dr." Alan Becker.

[Footnote continued on following page]

about EMC's product, all of which had been unknown to the Loewys and the others. (Tr. 110-11; DX A). The Loewys especially were concerned that the revelations in the article could cause the SEC to begin an investigation of EMC, which they feared would uncover the secret payments that had been made out of the offering proceeds. In an attempt to give the payments the appearance of having legitimate business purposes consistent with the recitations in the offering circular, the Loewys changed entries in EMC's check book stubs and created documents for EMC's files. Dissatisfied with the "cover" that had been created for the \$25,000 payment they had received in July, 1972 (that it was a commission for negotiating a \$250,000 sale for EMC), the Loewys had Becker sign a contract for them to produce a marketing program for EMC for \$25,000 (money had been earmarked in the offering circular for the development of such a program). They then hired another individual, for \$15,000, to put together the program. The Loewys also had Becker suspend the monthly payments on the management consulting contract. (Tr. 111-30; GX 18, 19).

As the Loewys had feared, the SEC began an investigation of EMC in October, 1972. (Tr. 111). The Loewys were particularly concerned about the \$50,000 that had been funnelled to Horizon through Iscoram Corporation, and in November, 1972, Benjamin Loewy tried to persuade DeFilippo to pay it back. Horizon, however, was in dire financial straits—it would soon go

In fact, the highest degree Becker had earned was a high school diploma. (Tr. 86-87, 91, 177-89; GX7). Soon after the SEC began its investigation of EMC, Becker was asked to give the SEC a copy of his academic record at New York University. Becker obtained from the university the academic transcript of another person named Allen Becker who had attended and graduated from the university, and he gave that transcript to the SEC. (Tr. 173-77).

out of business—and DeFilippo refused. (Tr. 286-88). The Loewys, therefore, concocted an elaborate scheme that they thought would “clean up” the EMC-Iscoram-Horizon payment. The Loewys had Becker write a \$50,000 check to Nova Equity Ventures, Inc. (“Nova”), Horizon’s parent company, for the purchase by EMC of a Nova debenture (though, as the Loewys and DeFilippo knew, Horizon, Nova’s main asset, was on the verge of financial collapse).^{*} Robert Loewy accompanied Becker to DeFilippo’s office to make sure the check was delivered to DeFilippo. With this \$50,000, DeFilippo purchased a bank check in the same amount payable to Iscoram Corporation and gave it to Robert Loewy. Robert Loewy deposited that check into the Iscoram checking account and wrote a check on that account, payable to “cash,” in the amount of \$54,500. With that check, Robert Loewy purchased a bank check in the same amount payable to EMC and gave it to Becker, who deposited it in EMC’s checking account. To complete the ruse, Benjamin Loewy had Becker write, for EMC’s files, a letter to Stanley Goldfoot cancelling EMC’s chemical order and asking Goldfoot to return the monies advanced to him in July, 1972. (Tr. 130-34, 141-48, 288-90; GX 21, 22A, 22B, 22C, 23A, 23B, 23C, 23D, 23E, 23F, 24).

In early 1973, Milchman^{**} met with Benjamin and Robert Loewy at the offices of CAC to discuss the SEC’s

^{*} EMC, of course, never collected a cent on this “debenture.” (Tr. 291).

^{**} Because of the SEC investigation, Milchman never completed the plan to divide the \$50,000 in treasury notes among himself, DeFilippo, Agostino and Rothman. Becker fired Milchman in November, 1972, and replaced him with another attorney. Milchman gave the treasury notes to Becker and EMC several weeks later. (Tr. 151, 331-32).

investigation, which continued to concern the Loewys. During the discussion, Milchman stated that the \$50,000 loan that had been made by EMC to Nova, using Iscoram as a conduit, would have to be cleaned up. Benjamin Loewy assured Milchman that the loan had been taken care of and was no longer a problem. (Tr. 337-38).

In 1974, EMC, by then insolvent, went out of business. (Tr. 151-52).

The defense offered no evidence.

ARGUMENT

POINT I

The Evidence of Robert Loewy's Obstruction of Justice Was More Than Sufficient.

Loewy contends that the evidence at trial was insufficient to support his conviction of endeavoring to obstruct justice in the SEC's investigation of EMC. A summary of the evidence against Loewy entirely answers this contention.

The evidence at trial showed that Loewy was present at—and, indeed, was often an active participant in—many of the meetings and conversations during which were discussed the various pay-offs from the EMC public offering proceeds. As a principal, with his father, of CAC, one of the main recipients of the payoffs, Loewy profited from the scheme and expected to profit further from it until the SEC investigation began. Loewy wrote a large portion of the offering circular, including the section describing how the company intended to use the proceeds of the offering; the circular did not disclose the pay-offs and diversions from the offering proceeds that were made and contemplated. When Becker's fraudulent conduct was exposed by the *National Observer*, Loewy

joined with his father and Becker in attempting to cover-up the misuse of the offering proceeds from the investigations of EMC that they feared would result from the *National Observer* article. To that end, Loewy and his father changed entries in EMC's check books to disguise the true nature of certain payments that EMC had made, and Loewy assisted his father in creating false and misleading documents in an attempt to conceal the most conspicuous pay-off that had been made to the Loewys, the \$25,000 that CAC received from EMC on the day the public offering closed. When the Loewys' fears proved well-founded and the SEC began its investigation of EMC in October, 1972, the Loewys were still concerned about covering-up from the SEC the \$50,000 that, shortly after the closing of the public offering, had been taken out of EMC supposedly to pay for non-existent chemicals and equipment but which in fact was diverted to Horizon through Iscoram Corporation. Since DeFilippo was unable to return the \$50,000 to EMC, the Loewys decided upon the scheme in which Becker and EMC in effect gave DeFilippo the \$50,000 to pay back EMC. Robert Loewy was present at the meeting with Becker and his father at which Becker was instructed to write a \$50,000 check to Nova. Robert Loewy accompanied Becker to have that check certified and then to Horizon's office to deliver the check to DeFilippo, and Robert Loewy—not Becker—took DeFilippo's \$50,000 check. Robert Loewy, accompanied by Becker, brought that check to a bank and with it purchased a bank check payable to EMC. Robert Loewy then took Becker to another bank, where EMC maintained an account, and saw to it that Becker deposited that last check into EMC's account. Robert Loewy was present when his father, to complete the cover-up, instructed Becker to place in EMC's files a carbon copy of the sham letter cancelling the non-existent chemical order. Several months later, Loewy attended a meeting with his father and Milchman to discuss the SEC investigation. When Milchman advised the Loewys that the EMC-Isoram-Horizon transactions should be cleaned up, Benjamin

Loewy, in Robert Loewy's presence, assured Milchman that the matter had been taken care of.

Section 1505 of Title 18 "deals with the deliberate frustrations through the use of corrupt or false means of an agency's attempt to gather relevant evidence." *United States v. Alo*, 439 F.2d 751, 754 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971); *see United States v. Cohn*, 452 F.2d 881, 883-84 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972). In *United States v. Solow*, 138 F. Supp. 812, 814 (S.D.N.Y. 1956), Judge Weinfeld made the following observation concerning Section 1503 of Title 18, which is the analogue of Section 1505 for judicial proceedings and which is virtually identical to Section 1505:

"But there is a further portion of the statute, an omnibus provision, directed towards 'whoever . . . corruptly . . . obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice . . .' This latter provision, under which the defendant has been indicted [as was Robert Loewy in the instant case], is all-embracing and designed to meet any corrupt conduct in an endeavor to obstruct or interfere with the due administration of justice."

"The word 'corruptly' is capable of different meanings in different connections. . . . [A]ny endeavor to impede and obstruct the due administration of justice in the inquiries specified is corrupt." *Bosselman v. United States*, 239 F. 82, 86 (2d Cir. 1917); *see United States v. Cioffi*, 493 F.2d 1111, 1118-19 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *Broadbent v. United States*, 149 F.2d 580, 581 (10th Cir. 1945); *United States v. Polakoff*, 121 F.2d 333, 335 (2d Cir.), *cert. denied*, 314 U.S. 626 (1941); *United States v. Henderson*, 386 F. Supp. 1048, 1055-56 (S.D.N.Y. 1974); *United States v. Cohen*, 202 F. Supp. 587, 588 (D. Conn. 1962). Thus, proof of threats, vio-

lence or bribes is not necessary to sustain a conviction under Section 1505. See *United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); *United States v. Cioffi*, 493 F.2d 1111, 1118-19 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974). Such actions as the creation of false documents and sham transactions to impede or to obstruct an agency's investigation fall within the prohibition of the statute. See *United States v. Vixie*, 532 F.2d 1277 (9th Cir. 1976); *United States v. Tallant*, 407 F. Supp. 878, 888 (N.D. Ga. 1975), *aff'd*, 547 F.2d 1291 (5th Cir.), *cert. denied*, 46 U.S.L.W. 3238 (U.S., Oct. 11, 1977); *United States v. Henderson*, 386 F. Supp. 1048, 1054-56 (S.D.N.Y. 1974); *cf. United States v. Alo*, 439 F.2d 751, 753-54 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). Moreover, the success or failure of the defendant's efforts to obstruct justice is irrelevant, as the statute reaches the "endeavor" to obstruct justice. See *United States v. Roe*, 529 F.2d 629, 632 (4th Cir. 1975); *United States v. Cioffi*, 493 F.2d 1111, 1118-19 (2d Cir. 1974); *United States v. Knohl*, 379 F.2d 427, 443 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967).

It is a well-settled rule that on appeal the evidence must be viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), with full weight accorded to "the right of the jury to determine issues of credibility, weigh the evidence, and draw reasonable inferences of fact." *United States v. Greenberg*, 534 F.2d 523, 524 (2d Cir.), *cert. denied*, 429 U.S. 831 (1976); see *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States v. Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972). The evidence at trial amply supported a finding that Robert Loewy knowingly and wilfully helped to falsify documents and create sham transactions, especially in connection with the cover-up of the money that was funnelled to Horizon, and that he did so to prevent the SEC from discovering how he and others had misused the proceeds of the EMC public offering. While Robert Loewy

now argues, as he did below, that there were innocent explanations for his conduct having nothing to do with an endeavor to obstruct the SEC's investigation, the jury was entitled to reject those arguments and find, as the evidence so clearly showed, that Robert Loewy was guilty of obstructing justice.*

POINT II

The District Court's Charge Was Correct.

Robert Loewy claims that the District Court's charge on obstruction of justice was inadequate because it failed to instruct the jury that the defendant must have acted with a corrupt intent. In fact, the District Court's charge on this requirement was in accord with applicable case law.

In instructing the jury on the obstruction of justice charge, Judge Brieant stated that the jury had to find

"that the defendant Robert T. Loewy did corruptly endeavor to obstruct or impede this proceeding by covering up payments from and uses of the proceeds of the public offering of EMC stock, which payments and uses had not been disclosed in the offering circular for the public offering.

* In his brief, Robert Loewy makes much of the fact that DeFilippo, in his testimony at trial, characterized Robert Loewy's role in the exchange of checks at Horizon's office in November, 1972, as that of a "messenger." (Br. 12, 14). DeFilippo also testified that on that occasion Robert Loewy stated that "he was there to make sure Iscoram got its money back." (Tr. 292). In any event, the characterization by DeFilippo—who was not privy to all aspects of the cover-up and Robert Loewy's role in it—was neither binding on the jury, the sole finders of fact, nor particularly relevant to their determination of whether Robert Loewy was guilty or not guilty of obstructing justice.

"The word 'corruptly', members of the jury, encompasses any evil intent on the part of the defendant to impede or obstruct the due administration of justice in the SEC investigation of Ecological. This corrupt intent needn't be the only motive for the defendant's actions so long as you find it was one of the motives for his actions. The purpose of the law is to prevent a miscarriage of justice by corrupt methods and the statute extends to any corrupt endeavor to obstruct or interfere with the due administration of justice by the use of trickery, schemes, or devices such as a cover-up or the falsification of documents." (App. 75a-76a).

Judge Brieant's definition of "corruptly" comports with the way in which that word has been defined in numerous cases. See *United States v. Cioffi*, 493 F.2d 1111, 1118-19 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *Broadbent v. United States*, 149 F.2d 580, 581 (10th Cir. 1945); *United States v. Polakoff*, 121 F.2d 333, 335 (2d Cir.), *cert. denied*, 314 U.S. 626 (1941) *United States v. Cohen*, 202 F. Supp. 587, 588 (D. Conn. 1962). Furthermore, in instructing the jury that the word "corruptly" requires an "evil intent," Judge Brieant's charge was substantially similar to the language that this Court found was not plain error in *United States v. Abrams*, 427 F.2d 86, 90 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970), relied upon by Loewy in his brief. See also *United States v. Partin*, 552 F.2d 621, 641-43 (5th Cir.), *cert. denied*, 46 U.S.L.W. 3262 (U.S., Oct. 17, 1977).

Moreover, Robert Loewy never requested that the trial court give a charge on corrupt intent different from the one that it gave, and he did not object to the corrupt intent charge after it was given. For those reasons alone—and in the absence of plain error, which the charge certainly was not—the attack Robert Loewy now makes on the charge must be rejected. Rule 30, Fed. R. Crim. P.; see *United States v. Wright*, 459 F.2d 65, 67 (8th Cir.

1972); *United States v. Leach*, 427 F.2d 1107, 1112-13 (1st Cir), *cert. denied*, 400 U.S. 829 (1970); *Clark v. United States*, 405 F.2d 166 (5th Cir. 1968); *United States v. Caci*, 401 F.2d 664, 669-70 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

PAUL VIZCARRONDO, JR.,
 AUDREY STRAUSS,
*Assistant United States Attorneys,
 Of Counsel.*

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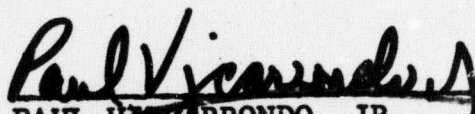
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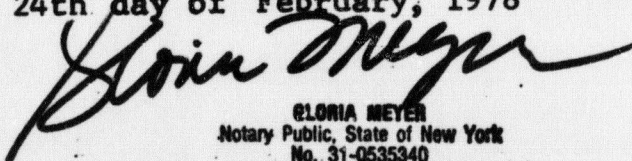
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